

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TALBERT D. MURPHREE

Claimant

VS.

FOOT LOCKER RETAIL, INC.

Respondent

AND

**AMERICAN CASUALTY COMPANY OF
READING, PA.**

Insurance Carrier

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Docket No. 1,050,388

ORDER

Respondent appeals the June 1, 2010, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded medical treatment with Dr. Joseph Sankoorikal as the designated treating physician and further granted temporary total disability compensation (TTD) from May 10, 2010, until claimant is released to return to work, is offered accommodated work within his temporary work restrictions or has attained maximum medical improvement, or until further order of the Court.

Claimant appeared by his attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 1, 2010, with attachments; and the documents filed of record in this matter.

After reviewing the record compiled to date, the undersigned Appeals Board Member concludes the Preliminary Hearing Order remains in full force and effect and the appeal of respondent shall be dismissed.

ISSUES

The ALJ awarded claimant both medical benefits and temporary total disability benefits for a December 22, 2009, accident and resulting injuries to his right hip and low back. Respondent contends the ALJ did not have jurisdiction to award claimant temporary total disability benefits as K.S.A. 44-510c(b)(3), when strictly construed, provides that no temporary total disability benefits can be awarded once a treating physician releases a worker to return to work. Respondent also maintains the ALJ did not have jurisdiction to award temporary total disability benefits because claimant quit his job when he had no restrictions on his activities. Further, respondent questions the ALJ's ruling that *Bergstrom*¹ overruled the requirement of good faith as it pertains to claims for temporary total disability benefits. In short, respondent argues the ALJ's authority to grant temporary total disability benefits ended March 25, 2010, when Dr. Dick Geis released claimant to full duty and, therefore, the Board should reverse the Preliminary Hearing Order.

Claimant first argues the Board should dismiss this appeal as the Board lacks jurisdiction in an appeal of a preliminary hearing order to reweigh the evidence and determine whether a worker is temporarily and totally disabled. In the alternative, claimant argues the Board should affirm the ALJ's finding that claimant is temporarily and totally disabled as claimant presented evidence he could not work due to worsening pain and that he needed additional medical treatment.

The issues before the Board on this appeal are:

1. Did the ALJ exceed her jurisdiction and authority by finding claimant was entitled to receive temporary total disability benefits for a period commencing after claimant had been released to work by a treating physician?
2. Does the Board have jurisdiction at this juncture to review the preliminary hearing finding that claimant is temporarily and totally disabled?
3. If so, did claimant satisfy his burden of proof?

FINDINGS OF FACT AND CONCLUSION OF LAW

After reviewing the record compiled to date, the undersigned Appeals Board Member finds and concludes this appeal should be dismissed.

The Board's jurisdiction in appeals of preliminary hearing orders is limited to those issues enumerated in K.S.A. 44-534a. Those issues are: (1) whether the worker

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

sustained an accidental injury, (2) whether that injury arose out of and in the course of employment, (3) whether the employer received timely notice and timely written claim, and (4) whether for any other reason the accident is not compensable under the Workers Compensation Act.²

Respondent argues an administrative law judge lacks jurisdiction to award temporary total disability compensation for any period after a treating physician releases an injured worker to return to work. Respondent cites K.S.A. 44-510c(b)(3), which provides:

Where no award has been entered, a return by the employee to any type of substantial and gainful employment or, **subject to the provisions of subsection (b)(2)**, a release by a treating health care provider or examining health care provider, who is not regularly employed or retained by the employer, to return to any type of substantial and gainful employment shall suspend the employee's right to the payment of temporary total disability compensation, but shall not affect any right the employee may have to compensation for partial disability. . . (Emphasis added.)

But, as stated, the above statute is subject to subsection (b)(2) of that statute, which provides:

Temporary total disability exists when the employee on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

When the subsections are read together, it is evident the question of whether a worker is temporarily and totally disabled at a certain point in time is a question of fact. And although K.S.A. 44-510c(b)(3) allows an employer to discontinue temporary total disability benefits either upon a worker's return to work or upon a doctor's release when no award has been entered, that statute does not create a conclusive presumption against temporary total disability. That issue remains in the province of the administrative law judge when the parties are unable to otherwise agree.

In summary, the undersigned finds that the ALJ had jurisdiction under the preliminary hearing statute, K.S.A. 44-534a, to address claimant's entitlement to temporary total disability benefits. The issue of whether claimant meets the definition of

² See K.S.A. 44-534a(a)(2).

being temporarily and totally disabled is not one of the jurisdictional issues set forth in K.S.A. 44-534a over which this Board has the authority to review in the appeal of a preliminary hearing order. Consequently, this appeal should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated June 1, 2010, remains in full force and effect, and the appeal of respondent in this matter is dismissed.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

HONORABLE GARY M. KORTE

c: Jeff K. Cooper, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

³ K.S.A. 44-534a.